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Note by the Secretariat

Addendum

Contribution by the American Association for the International Commission of Jurists

The attention of the Preparatory Committee is drawn to the attached contribution by the American Association for the International Commission of Jurists, an affiliated organization of the International Commission of Jurists, a non-governmental organization in consultative status with the Economic and Social Council (category II). The document is entitled "The interdependence of development and the constitutional order".

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UNITED NATIONS WORLD CONFERENCE ON HUMAN RIGHTS

The Interdependence of Development and the Constitutional Order

Submission of
The American Association for
the International Commission of Jurists,
an affiliated organization of the International Commission of Jurists,
a non-governmental organization in Category II consultative status.

Vienna
June, 1993

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Preface

The International Commission of Jurists (ICJ) together with its worldwide network of sections and affiliated organizations have, since the ICJ Declaration of Delhi in 1959, advocated that human freedom, to be meaningful, requires the progressive realization and implementation of all the rights set forth in the United Nations International Bill of Human Rights and its components; the Universal Declaration of Human Rights and the International Covenants on social, economic, cultural, civil and political rights.

At the ICJ Hague Conference on Development, Human Rights, and the Rule of Law in 1981, we reaffirmed this thesis and declared that sustainable development is an indispensable component of the realization of democratic ideals.

We earnestly hope that the principles and recommendations found in this submission to the participating governments and the preparatory committees of the United Nations World Conference on Human Rights in Vienna in June of 1993 will find their way into the final document recommending the strengthening of international cooperation in the field of human rights.

The contributions to the advancement of these fundamental principles by the ICJ over the years cannot be ascribed to any one person. Great credit must go to the ICJ commissioners, its Executive Committees, and to its past Secretary Generals, Sean MacBride, Nobel Laureate and

former Foreign Minister of Ireland, and Niall MacDermot, Q.C., OBE, all of whom labored so long in the vineyard of the rule of law and human rights.

We are also deeply appreciative for the indispensible help given to us in the preparation of this paper by the Morgan Institute for Human Rights at the University of Cincinnati, to its Director Bert B. Lockwood, Jr., to Morgan Senior Fellow Grace Severyn, and to Dr. Clarence Dias of the International Center for Law in Development.

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President, American Association for the ICJ; Honorary Member of the ICJ; and Past Chairman of the ICJ International Executive Committee from 1975-1990

April 1993

THE INTERDEPENDENCE OF DEVELOPMENT AND THE CONSTITUTIONAL ORDER

Introduction

The United Nations convened its first World Conference on Human Rights in Teheran in 1968, with 84 nations participating. At that conference, the International Commission of Jurists (ICJ) presented the important and well-developed recommendations of the World Assembly for Human Rights, which ICJ Secretary General Sean MacBride had co-chaired in Montreal, Canada earlier that year.[1]

Now, twenty-five years later, the United Nations will convene its second World Conference on Human Rights in Vienna and approximately 180 nations will participate. The General Assembly of the United Nations has stated that one of its goals is "to examine the relationship between development and the enjoyment by everyone of economic, social, and cultural rights as well as civil and political rights."[2]

This submission seeks to stress the crucial significance

The World Conference on Human Rights in Teheran took place on April 22 - May 13, 1968. The recommendations of the World Assembly are contained in the *Montreal Statement of the Assembly for Human Rights, March 22-27, 1968*. The assembly, co-chaired by Sean MacBride and Leslie Paffrath, President of the Johnson Foundation, Racine, Wisconsin, U.S.A., recognized the profound relationship between human rights and development.

G.A. Res. 45/155 of December 18, 1990, at para. 1(b). *See also* G.A. Res. 46/116 of December 17, 1991.

of linking the progressive realization of international human rights and development. We are convinced that, in most parts of the world:

> There can be no sustainable development without constitutional order and conversely, there can be no constitutional order without sustainable development.[3]

This relationship between democracy and development has garnered much attention in the international community in recent years. One of the most significant and important endorsements of the international community evolved out of the Stockholm Initiative in 1991 when some thirty-five heads of State, former heads of State and prominent world leaders unanimously agreed that:

> If democracy is to be sustained, freedom will have to be harnessed to constitutionalism. But the rule of law becomes endangered if it is synonymous in the eyes of the people with sustained deprivation and with the sense of injustice it breeds. This is not the stuff on which Democracy thrives.
>
> [W]ithout democracy, a people's potential for social and economic development cannot be fully realized. Yet, with-

[3] "Constitutional order" refers to an effective legal system, wherein fundamental human rights are guaranteed. The definition is in accord with the definition of "a democratic society" as per the Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights: "While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition." See Limburg Principles, *infra* note 11, at para. 55.

> out tolerable social and economic conditions, and a vision of the future that makes hope plausible, *democracy itself will be unsustainable.*[4]

The ICJ, a nongovernmental organization (NGO) with consultative status at the United Nations, together with its affiliated organization, the American Association for the International Commission of Jurists (AAICJ), have achieved distinction within the international community for their work to promote human rights under the rule of law.[5] The ICJ and AAICJ have devoted considerable attention to the linkage of democracy, development, constitutionalism, and economic improvement. They have been forerunners in stressing that the rule of law and respect for all human rights are *inseparable* from human development.

Accordingly, the AAICJ believes that a statement reiterating the interdependency of development and constitutional order in the final document of the U.N. World Conference would contribute significantly to the promotion, implementation, and protection of human rights

[4] *Common Responsibility in the 1990's, The Stockholm Initiative on Global Security and Governance of 22 April 1991* (hereinafter Stockholm Initiative) (Stockholm: Prime Minister's Office, 1991), at p. 33 (copies available from the Prime Minister's Office) (emphasis added).

[5] The concept of the rule of law refers generally to the concept of government by laws, not by men. As used by the ICJ, it refers to more than just the formal use of legal instruments: it also incorporates the rule of justice, protection for all individuals against excessive governmental power, and reasonableness.

The ICJ has been awarded many distinctions from the international community for its contributions to protecting human rights. It was awarded the first European Human Rights Prize by the Council of Europe in 1980, the Wateler Prize in 1985, and the 1989 Erasmus Prize for Human Rights. The ICJ's strength in promoting and implementing human rights by the process of observation and judgment has also been commended. See Stockholm Initiative, supra note 4, at p. 34.

worldwide. Recognition of this interdependence is essential if development is to promote the realization of *all* human rights[6]— civil, political, economic, social, and cultural—of *all* persons and *all* peoples.

[6] The ICJ works to promote all the human rights set forth in the International Covenant on Civil and Political Rights (ICCPR), opened for signature 16 December 1966, entered into force 23 March 1976; G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16), at 52, U.N. Doc. A/6316 (1966) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), opened for signature 19 December 1966, entered into force 3 January 1976; G.A. Res. 2200 A (XXI), 21 U.N. GAOR Supp. (No. 16), at 49, U.N. Doc. A/6316 (1966). These covenants, together with the Universal Declaration on Human Rights, G.A. Res. 217A., U.N. Doc. A/810 (1948), are collectively referred to as the International Bill of Rights. As of 18 March 1993, the Covenant on Economic, Social, and Cultural Rights had 53 signatures and 120 ratifications, and the Covenant on Civil and Political Rights had 57 signatures and 117 ratifications.

Historical Perspective

Over thirty years ago, before the ratification of the two international covenants on human rights, the ICJ emphasized that:

> [T]he rule of law is a dynamic concept ... which should be employed not only to safeguard and advance the civil and political rights of an individual in a free society, but also to establish the social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.[7]

As the debate in the world community grew over the relationship between development and human rights, the ICJ convened a conference in 1981 at the Hague on development and the rule of law. It concluded that:

> 1. Development should "be seen as a global concept including with equal emphasis civil and political rights and economic, social and cultural rights."[8]

[7] Declaration of Delhi, 5-10 January 1959, *The Rule of Law in a Free Society* (Geneva: ICJ, 1959).

[8] See Summary of Discussions and Conclusions of the Conference on Development and the Rule of Law, reprinted in *Development, Human Rights and the Rule of Law, Report of a Conference held in The Hague on 27 April - 1 May 1981*, convened by the International Commission of Jurists, (New York: Pergamon Press, 1981), Conclusion 4, at p. 224 (hereinafter Hague Conference).

> 2. True development requires a recognition that the different human rights are inseparable from each other, and that development is inseparable from human rights and the rule of law.[9]

Throughout its history, the ICJ has been active in influencing the development of international law in a direction that recognizes the relationship between the rule of law and human development.

The ICJ, over the last several decades, has promoted:

(i) The drafting and implementation of the African Charter on Human and Peoples' Rights and the formation of the African Commission on Human and Peoples' Rights.

(ii) The creation of the Andean Commission of Jurists to promote the protection of human rights (especially those of indigenous peoples) in the Andean region.

(iii) The formulation of the Siracusa Principles on the

[9] See Hague Conference, *supra* note 8, Conclusion 7, at p. 224.

The concept that civil and political rights and economic, social and cultural rights are indivisible and interdependent underlies the ICJ's conclusions. U.N. doctrine on this issue is clear: "All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights." G.A. Res. 32/130 adopted in 1977.

The ICJ has, over the years, stressed that there is no hierarchy or priority among rights and that all rights must be attained to ensure the freedom, dignity, and well-being of the human person. In a 1979 report, the AAICJ noted that all governments are committed under the United Nations Charter to observe economic, social and cultural rights as well as civil and political rights. It continued, stating that:

> No persuasive evidence has been adduced that civil and political rights need to be derogated or sacrificed to meet essential human needs.... These two sets of freedom are in practice of comparable value to individuals throughout the world no matter what economic or political system they live under.... Essential rights—political and civil, economic and social—need to be encouraged with equal favor.

Toward an Integrated Human Rights Policy," AAICJ, December 1979, at pp. 3, 5, and 6.

Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.[10]

(iv) The formulation of the Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights.[11]

(v) The elaboration of international principles on the Independence of Judges[12] and on the Independence of the Legal Profession.[13]

(vi) The United Nations declaration on the right to development and the recognition that development must incorporate respect for all human rights.[14]

Through all these activities, as well as in others not listed, the ICJ has worked to emphasize that equal attention must be accorded to civil, political, economic, social, and cultural rights and that respect for human rights, the rule of law (as safeguarded by constitutional order), and development are inseparable.

[10] Siracusa Principles, drawn to the attention of the Commission on Human Rights at its 1985 Session by the Permanent representative of the Netherlands to the U.N. office at Geneva, U.N. Doc. E/CN.4/1985/4, also published with background papers in 7 *Human Rights* Q. 1 (1985) and in pamphlet form by the American Association for the International Commission of Jurists (New York, 1985).

[11] Limburg Principles, drawn to the attention of the U.N. Commission on Human Rights at its 1987 session at the request of the Permanent Mission of the Kingdom of the Netherlands, E/CN.4/1987/17, also published with background papers in 9 *Human Rights* Q. 122 (1987).

[12] Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, reprinted in *Human Rights: A Compilation of International Instruments*, U.N. Doc. ST/HR/1/Rev. 3 (New York: United Nations, 1988).

[13] Draft Proposal on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers, U.N. Doc. E/CN.4/RES/1992/33.

[14] *See* Written statement submitted by the ICJ to the working group of governmental experts on the right to development, First Session, Geneva, U.N. Doc. E/CN.4/AC.34/WP.4 (1981). The ICJ noted that "[a] national development strategy based on repression and the denial of either civil and political rights or economic, social and cultural rights or both, not only violates international human rights standards but is a negation of the concept of development. Respect for *all* human rights is an essential ingredient of development." Id. at para. 7.

Sustainable Development and Human Rights

One of the most significant achievements of the last Development Decade has been the recognition that respect for human rights is a vital component of development. Human rights have been added to longstanding concerns about economic growth, the alleviation of poverty, and the provision of basic material human needs as the goals of development.[15] In fact, development is defined as:

> a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.[16]

[15] The World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press; 1987) (Chair: G.H. Brundtland), at p. 92 (hereinafter Brundtland Report). The Brundtland Report adds an intergenerational dimension by defining sustainable development as that which seeks to meet the needs of the present generation without compromising the ability of future generations to meet their own needs. *Id.* at p. 43. The commission concluded that sustainable development requires a "political system that secures effective citizen participation in decision making." *Id.* at p. 65.

[16] Declaration on the Right to Development, G.A. Res. 41/128 of 4 Dec. 1986, 41 U.N. GAOR Supp. (No. 53) at 186, U.N. Doc. A/41/53 (1986); reprinted in *Human Rights: A Compilation of International Instruments*, *supra* note 12. The Declaration provides in Article 1 that:

> 1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully recognized.

The U.N. understanding that freedom is a vital component of human development has been reiterated in many contexts.[17] Indeed, the Global Consultation of the Right to Development convened by the U.N. Human Rights Centre strongly reaffirmed that realization of *all* human rights is the *raison d'etre* development.[18] It is thus clear that the process of development requires respect for human rights for its fulfillment. Conversely, certain human rights, especially economic, social, and cultural rights, cannot be fully recognized without development.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

17 See United Nations Development Programme (UNDP), *Human Development Report 1992* (New York: Oxford University Press, 1990), at p. 26, which states that the purpose of human development is to increase people's range of choices. It concludes that freedom is thus more than an idealistic goal. "[I]t is a vital component of development." The first annual UNDP report, *Human Development Report 1990*, at pp. 16 and 84, reiterated that development is incomplete without freedom and that freedom is the most vital component of development.

This concept also underlies a series of documents, including the Proclamation of Teheran, U.N. Doc. ST/HR/1/Rev 2, pp. 18-19; the U.N. Declaration of Social Progress and Development, U.N. G.A. Res. 2542 (XXIV) of 11 Dec. 1969; and G.A. Res. 32/130 adopted in 1977. It was also reflected in Conclusion 10 of the Hague Conference, *supra* note 8, at p. 225, which states that development is designed to create conditions in which every person can enjoy all his/her human rights, whether economic, social, cultural, civil or political. *See also* Brundtland Report, *supra* note 15, at p. 91.

Regional organizations have also reiterated this notion. See e.g. Angola-Botswana-Lesotho-Malawi-Mozambique-Namibia-Swaziland-Tanzania-Zambia-Zimbabwe: Declaration Regarding Establishment of the Southern African Development Community, 17 August 1992, reprinted in 32 *Int'l Legal Mats.* 267 (1993). The Declaration defines human development as a "process of developing an individual's potential to the fullest, through education and training, improved health, ability to earn a decent living, the exercise of economic and political choices, and guaranteed basic human rights, to afford him/her full involvement in the development process." *Id.* at p. 270.

18 See the final report of the "Global Consultation of the Right to Development as a Human Right," U.N. Comm'n on Human Rights, 46th Sess., U.N. Doc. E/CN.4/1990/9/Rev.1 (1990).

Constitutional Order and Human Rights

International human rights law provides both definition and content to constitutional order. The term constitutional order refers to an effective legal system, wherein fundamental human rights are guaranteed. To develop and maintain constitutional order, a government must incorporate the following characteristics:

a) The will of the people shall be the basis of the authority of government.[19]

b) Everyone must have the right to take part in the government of his country, directly or through freely chosen representatives.[20]

[19] Universal Declaration, Art. 21(3). The will of the people shall be expressed in periodic and genuine elections as described in Article 21(3) of the Universal Declaration.

The importance of the will of the people is captured in the observation that strong sustainable democracy and constitutional order cannot develop "on external command. It has to evolve as a result of internal demand." Stockholm Initiative, *supra* note 4, at p. 35.

[20] Universal Declaration, Art. 25(1). Popular participation in economic and social development has been defined by the U.N. as "active and meaningful involvement of the masses of people at the different levels in (a) the decision-making process for the determination of societal goals and the allocation of resources to achieve them; and (b) the voluntary execution of resulting programmes and projects." Popular Participation in Decision-Making for Development (U.N. Sales No. E.75.IV.10 (1975), p. 4.

The U.N. Declaration on the Right to Development, *supra* note 16, in Article 2, emphasizes popular participation in development:

1. The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

3. States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

c) Governance must be based on a set of laws that have been formulated with the consent of the people.[21]

d) An independent and impartial judiciary must be operative.[22]

e) The State must guarantee to all persons security of person against arbitrary arrest or detention, and torture.[23]

f) Equality before the law and equal protection of the laws must prevail.[24]

g) The State must preserve and promote the dignity of the human person (individual and collective).

h) The national constitution must reflect the international human rights commitments resulting from ratification of international human rights treaties and conventions.

i) The State must respect the principles of non-derogability of human rights.[25]

[21] ICCPR Art. 25(a). *See generally* Philip Alston, "Development and the Rule of Law: Prevention versus Cure as a Human Rights Strategy" in Hague Conference, *supra* note 8, at p. 55-58, which points out that in the absence of popular participation in the formulation of laws and in the design and implementation of structures to implement the laws, the rule of law becomes a fraudulent concept.

[22] Basic Principles on the Independence of the Judiciary, *supra* note 12.

[23] ICCPR, Arts. 7 and 9.

[24] "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law." ICCPR, Art. 26.

[25] ICCPR, Art. 4.

Implicit in these characteristics is the basic understanding that the rule of law is inextricably linked to genuine citizen-based constitutional order. Additionally, the importance of constitutional order to good governance has been gaining recognition.[26]

In summary, respect for all human rights is the essential element of constitutional order. Constitutional order cannot be created or sustained without respect for human rights. Conversely, human rights, especially civil and political rights, can only be fully realized in a society based on constitutional order.

[26] *See e.g.* Declaration Regarding Establishment of the Southern African Development Community, *supra* note 17, in which the countries of Southern Africa agreed to adopt a framework of cooperation which provides for "democracy and good governance, respect for the rule of law and the guarantee of human rights, popular participation and alleviation of poverty."

See also Gerald Schmitz, *Achieving Good Government: Toward as Assessment of Developing Countries' Needs and Opportunities for Assistance* (Ottawa: North-South Institute, 1991).

The Inter-relationship between Constitutional Order and Development

As indicated above, development and respect for human rights are inescapably interdependent, and constitutional order and respect for human rights are likewise interdependent. But what is the relationship between human development and constitutional order? Because development cannot progress without respect for all human rights, and because respect for all human rights can only be achieved within a society based on constitutional order, development cannot proceed without constitutional order. Conversely, because constitutional order incorporates respect for human rights, and because certain human rights cannot be attained absent development, genuine constitutional order cannot be sustained without development.

This conclusion that development and constitutional order are mutually dependent has been borne out by observation. The AAICJ has observed that:

> A. Countries in wh.ch there is respect for the rule of law (as safeguarded by constitutional order) reach a much higher level of human development than those which are based on more authoritarian forms of government.[37]

[37] Stockholm Initiative, *supra* note 4, at p. 32 ("While there are examples of authoritarian countries where economic growth has been strong, and while there are examples of countries with free elections where there has been developmental retrogression, it has become clear that ... certain democratic requisites are crucial to sustain development.")

> Sustainable development, therefore, must be harnessed to constitutionalism.[28]

> B. When development fails, even in so-called free societies, democracy (constitutional order) becomes synonymous with injustice. Ultimately, such a condition destroys what is left of the democratic institutions. Conversely, when development is successful, the existing democratic institutions are strengthened.[29]

Thus, in general, a higher level of development is observed in states governed by constitutional order; and constitutional order cannot be sustained without development. It follows from these two observations that just as constitutional order is necessary for development, development is critical for sustained constitutional order.

[28] *See* The United Nations Development Programme, in its *Human Development Report 1991* (New York: Oxford University Press, 1991) at p. 3, which concluded that "high levels of human development tend to be achieved within the framework of high levels of human freedom." In its *Human Development Report 1992*, the UNDP sought to determine if political freedom contributes to economic growth. Its study employed data from 104 nations ranked according to two indexes. The "political freedom index" was constructed by combining measures of political rights grouped into five broad categories: personal security, rule of law, freedom of expression, political participation, and equality of opportunity. The "human development index" was constructed by combining measures of life expectancy at birth, mean years of schooling, adult literacy, and income. The report concluded that "Political freedom and human development do seem to move in tandem." Countries with "high" political freedom index scores also had "high" human development index scores. *Id.* at 32.

See also Stockholm Initiative, *supra* note 4, at p. 33.

[29] *See* Stockholm Initiative, *supra* note 4, at p. 33.

RECOMMENDATIONS

The AAICJ makes the following recommendations:

1. The final document of the U.N. World Conference should specifically recognize the interdependency of development and constitutional order based on the rule of law.

2. That specialized agencies of the U.N. dealing with development (including the United Nations Development Programme, World Bank, and International Monetary Fund) should strengthen and reinforce the interdependence of development and constitutional order in all of their activities.

3. That U.N. organizations dealing with human rights (especially the U.N. Human Rights Centre) similarly should strengthen and reinforce the interdependence of constitutional order and development in all of their activities.

4. That all international and regional intergovernmental organizations should recognize, respect, and strengthen the vital role that NGOs can play in monitoring governmental adherence to the norms of international law, especially as regards development and constitutional order.